

Independent Contractor Study Committee
Minutes: October 22, 2003

Attendance: Riley Johnson, James Nys, Brian Smith, Nancy Butler, Jacqueline Lenmark, Larry Jones, Dave Cogley, Cary Hegreberg, Byron Roberts, Carl Schweitzer, Jerry Driscoll, Larry Mayo, Jason Miller, Jerry Keck

Facilitator: John Andrew

Minutes: Keith Messmer

1. **Introductions of Committee Members:** Wendy Keating officially welcomed the members and thanked them for their willingness to serve on this committee.

Members of the committee then took turns introducing themselves and explaining their perspectives on what would be the best outcome of this committee's work and what would be the worst outcome if the committee made no recommendations. The list of outcomes is attached.

2. **Description of the IC exemption process:** Maggie Connor, Program Manager of the Independent Contractor Central Unit of ERD presented an overview of the history of the Independent Contractor statutes and exemption process in Montana. A copy of the handout from that presentation is available to anyone who is interested.
3. **Montana Supreme Court Decision, Kelly Wild v. Fregein Construction and Montana State Compensation Fund:** Kevin Braun, Chief Legal Counsel for the Department of Labor gave the committee a synopsis of the Supreme Court Decision. The court found conflicts with the conclusive proof of the IC exemption found in 39-71-401 MCA and the definition found in 39-71-120 and found the conclusive presumption to be in violation of the public policy in 39-71-105 MCA. The court found that the employer must make at least a good faith inquiry to verify the relationship.
4. **Presentation of Best Practices Study:** Brandon Miller, Vice President of the Hayes Companies, explained the study that his company conducted under a contract with the Department. Hayes researched the independent contractor laws of all 50 states and found only 7 states other than Montana that have a registration and exemption process. Copies of this report are available upon request.

5. **Open Discussion:** The group then shared ideas regarding the exemption process.

Brian: The IC exemption in its current affidavit form is useful in court

Carl: Exemption gives you a false sense of security.

Dave: Four states have a rebuttable presumption with the burden on the claimant to prove he wasn't an IC.

Jerry D.: Should have language on the IC form that if A & B are violated this exemption does not mean anything.

Kevin: The existence of the exemption helps establish the B part of the definition.

Jason: If the employer requires this as a condition of employment it is an egregious example.

Jerry K: Explained the possibility of issuing a provisional license.

Byron: The abuses within the system need to be addressed.

Larry: Under a rebuttable presumption the burden shifts. You are presumed to be an IC. The IC must prove that he is not an IC, and then hiring authority gets a chance to rebut.

Dave: There is now a presumption of employee status in the statute.

Larry: Mathews felt he was an IC when he fell off the roof. Insurers have the burden of proof according to the Mathews case. Need a convincing accumulation of undisputable evidence. He would like to address the statutes in light of the SC case. The court did not throw out the possibility of conclusive presumption. Treweiler had found in a separate case this was ok.

Dave: Employee complicity in this process. Employee makes a conscious decision whether to work or not.

Riley: The 1995 statute is what this will become as economic development is touted by the legislature. The Supreme Court is changing. The decision could be overturned so go slowly in the changes that are made. The test of anything we recommend is whether it is something that can be sold to the powers that be.

Nancy: The State Fund is looking at the exemption differently now.

Larry: Liberty asks more questions when the exemption is seen.

Cary: Contractor pool is requiring everyone on the job site to have workers' compensation insurance.

Larry: Should also have your company name placed on the policy certificate so you are automatically notified if the coverage is dropped.

Riley: WC is just the tip, there is also Revenue, UI, IRS. The wrong decision can put a business out of business. The Microsoft decision could be a class action and affect other large employers.

Jerry K.: Could require more proof up front. If the applicant can't provide the information initially, then have to provide it in 6 months.

Jim: Why do we care?

Larry: Employers rates will go up significantly with injuries where they think they have IC's.

Byron: Can we create conclusive presumption once again?

Larry: I think we can, but it is a matter of public policy. The standard is extremely low right now. Sharp case, the company simply bought some of her cleaning supplies. Had a case with a moving company who leased a truck and loaned the owner a ramp so he became an employee.

Brian: I see the same thing.

Jacqueline: We care because someone will have to pick up the bill. It is a level playing field issue.

Riley: There is confusion out there. Employer should be provided a sheet with the things they are needing to find out. Need a set of definitive rules that the employer can meet.

Brian: There are the 4 safe harbors in the IRS code.

Carl: SC changes the rules all the time. Never find an IC.

Byron: Could there be a model contract?

Brian: No, if you control they are an employee regardless of the contract.

Jim: Exemption meets the B part of the test, you still have to demonstrate the A part. Include examples of what can happen if you waive your rights. Self-employment tax of 15% off the top.

Riley: Employee should have some responsibility in this for his actions.

Jerry K.: Looked at having liability insurance policy requirement in the session. Viewed as too expensive. What about a medical only policy? Similar to like insurers provide for volunteers. Can insurers tell us is this possible and what it would cost?

Nancy: It would be determined by what it would take to make it actuarially sound. Could have a constitutional problem.

Riley: If you require coverage, what about the other taxing entities?

Cary: Everyone working for Contractors Group must have WC coverage.

Byron: What about the economic considerations?

Riley: Medical only, could still sue you for wage loss.

Dave: Health insurance does not give you a break on the price if you purchase WC insurance.

Brian: Has seen supplemental policies. Run out benefits then file the WC claim.

Dave: Elimination of the exemption is not a politically viable option.

Byron: Public education is needed. Number of roofing firms throughout the state who feel they are correct in making everyone IC's. Need to make this not ok.

Cary: Needs met out of this. ID core elements that everyone can agree to. We might need to raise the bar on employees and IC's. The bar is currently too low, but the SC could overrule whatever bar we set.

Jason: If you raised the bar you no longer have 29,000 IC's.

Jacqueline: Knowing when the bar has been met is the real issue.

Dave: Lack of review of status mentioned by court, but what happens as the situation changes?

Riley: Specifying what you are an IC for on the form.

Larry: Lundberg v Pyramid case – no control yet he only had 1 client so was deemed to be an employee. Employer has to do the follow-up.

Jim: Voluntary education. Have a web site and give the general questions they have to answer to determine if the relationship they have with the person is valid.

Riley: Break into construction and non-construction. Simplify and communicate. Broach to the interim committee if they would be in favor of mandatory coverage.

Jacqueline & Jerry: This should come from the employer industry.

Dave: Harmonize 120 and 401(3)(c)

Riley: More individual responsibility.

Jacqueline: Know how much crosschecking there is on these exemptions or question consistent application of status. Don't want to create inconsistencies between agencies.

John: ICCU decision is conclusive for all agencies, UI, DOR, WC, Wage and Hour.

Byron: Fee based process; look at fees charged if we make changes to the IC exemption.

Jim: Will changes we make affect the statutory exemptions?

Cary: IC exemption has to mean something, needs to be valid and defensible.

Jacqueline: Attempt to reduce the amount of litigation is the purpose of the IC exemption.

Jerry D.: Homeowner protection was the initial reason for the IC exemption.

Dave: Maybe the process of IC exemption can be done away with.

Jerry K: How much litigation occurs in the other states?

Public comments were then taken:

Margaret Morgan: Why do we have so many IC's? Because of the seasonal industry we have and the culture of the Western states. Shortage of industry in the US. Number of IC's should not be discouraged.

Jason Todhunter: A commercial liability policy is required in the logging industry, could you require it for IC's? The general contractor can get a rider to cover subs that don't have it.

Themes from discussion:

Revise the form – Better notice

Rebuttable presumption – proof standards- conclusive presumption

Standards for new IC's

Abuses of system – forced IC's

Harmonize statutes

Notice by insurers to insureds – IC vs. employee

Notification of termination or lapse of IC status

Documentation needs

Database needs – searchable vs. static

What information can be provided to clear uncertainty?

The certification process must have meaning

The bar is too low to be an IC

More qualifications needed to reach the bar

Better pre-determinations – standards for new IC's

How do you follow up on changes of IC's?

More specificity as to what type of IC you are.

Better/More education to make informed decisions.

Better description of what is being reregistered – IC Independent business?

Harmonize the statutory presumption

Crosschecking – consistent application and enforcement

Fee analysis

Change in the administrative regulation/statutes/process to bring certainty

Next Meeting:

Cary: Flush out a range of alternatives based on the input today. Draft language to harmonize the statutes with conclusive proof in and with rebuttable language. 105 and 401 statutes must be included.

Larry agreed to draft conclusive proof language for the group's consideration.

Jerry Driscoll will write statutory language favoring employees.

The Department will develop alternatives and set up the next meeting for January or February.